

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
October 28, 2003 Session

STATE OF TENNESSEE v. DEMPSEY HAROLD, JR.

Appeal from the Criminal Court for Hawkins County
No. CR-14 James Edward Beckner, Judge

No. E2003-00358-CCA-R3-CD
February 19, 2004

The defendant, Dempsey Harold, Jr., was convicted of vandalism under \$500, a Class A misdemeanor. The trial court imposed a sentence of eleven months and twenty-nine days, with the defendant to be eligible for work release or other such programs after service of 30 percent in confinement. See Tenn. Code Ann. § 40-35-302(d). In this appeal, the defendant alleges that the evidence is insufficient to support the conviction and that the trial court erred by imposing a sentence of confinement. The judgment of the trial court is affirmed.

Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed

GARY R. WADE, P.J., delivered the opinion of the court, in which JOSEPH M. TIPTON and ALAN E. GLENN, JJ., joined.

John S. Anderson, Rogersville, Tennessee, for the appellant, Dempsey Harold, Jr.

Paul G. Summers, Attorney General & Reporter; Renee W. Turner, Assistant Attorney General; and Victor J. Vaughn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On June 26, 2002, the victim, Heather Harold, who was the defendant's estranged wife, was driving the defendant to his residence. As they passed the residence of the defendant's mother, located only one hundred yards from their destination, Monika Williams, who was standing in the yard, yelled at the victim. According to the victim, she continued on to the defendant's house, where the defendant received a telephone call from his mother. The victim and the defendant then drove to his mother's residence in separate vehicles. Upon their arrival, Ms. Williams and the defendant's mother "charged" the victim's car. Ms. Williams grabbed the victim by the hair and the two women fought. The defendant then struck the victim's 1979 Mercury Capri automobile several times with a metal baseball bat. The estimated cost of repair to the vehicle was \$3212.76. The vehicle, which had been given to the victim by her father while she was in high school, was titled in her name. The

victim acknowledged that even though she and the defendant had instituted divorce proceedings at the time of the incident, she had continued to share a residence with the defendant.

At trial, Ms. Williams testified for the defense. She claimed that she went to the defendant's mother's house to speak with the defendant about their son. She acknowledged that when she saw the victim and the defendant drive by, she shouted for them to stop. Ms. Williams admitted striking the victim several times but claimed she did so only after the victim refused to leave and swung her fist. Ms. Williams insisted that the defendant did not damage the victim's car.

The defendant testified that he and the victim had continued to live together in his house after their divorce suit was filed. While acknowledging that he saw Ms. Williams trying to get his attention as he drove to his house, the defendant contended that he did not return to his mother's residence until she called saying "there was a problem with his son." The defendant claimed that the victim tried to prevent him from leaving and then followed him in a separate car to his mother's house. He acknowledged that Ms. Williams and the victim fought but denied striking the victim's car with a baseball bat.

I

The defendant asserts that the evidence is insufficient to support his conviction because the vehicle was marital property. The defendant contends that because the car was marital property the state failed to prove that he damaged the property "of another." The state argues to the contrary and insists that the issue has been waived because the defendant has failed to support his claim with citation to authorities and has failed to include appropriate references to the record.

On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. Liakas v. State, 199 Tenn. 298, 286 S.W.2d 856, 859 (1956). Because a verdict of guilt removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992).

A person is guilty of vandalism when he "knowingly causes damage to or the destruction of any real or personal property of another or of the state, the United States, any county, city, or town knowing that the person does not have the owner's effective consent." Tenn. Code Ann. § 39-14-408(a).

Initially, the record establishes that the defendant filed a motion to dismiss the charge because the car was marital property. The ruling by the trial court on the motion is not a part of the record. It is the duty of the appellant to prepare a complete and accurate record on appeal. Tenn. R. App. P. 24(b). The failure to prepare an adequate record for review of an issue results in a waiver of that issue. Thompson v. State, 958 S.W.2d 156, 172 (Tenn. Crim. App. 1997). Further, "[i]ssues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court." Tenn. Ct. Crim. App. R. 10(b); see also Tenn. R. App. P. 27(a)(7); State v. Hammons, 737 S.W.2d 549, 552 (Tenn. Crim. App. 1987).

More important, the defendant is not entitled to relief on the merits. The evidence adduced at trial established that the vehicle had been given to the victim by her parents more than ten years before the offense. Both the victim and her father testified that the victim was the titled owner of the car. The defendant did not present any proof on the issue of ownership. Under these circumstances, it is our view that the evidence is sufficient.

II

The defendant also complains that the trial court should not have ordered a sentence involving confinement. When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597, 600 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

In misdemeanor sentencing, the trial court is not required to conduct a sentencing hearing but must provide the defendant with a reasonable opportunity to be heard as to the length and manner of the sentence. Tenn. Code Ann. § 40-35-302(a). The sentence must be specific and consistent with the purposes of the 1989 Sentencing Act. Tenn. Code Ann. § 40-35-302(b). Not greater than seventy-five percent of the sentence should be fixed for service. Tenn. Code Ann. § 40-35-302(d). In determining the percentage of the sentence to be served in actual confinement, the trial court must consider the enhancement and mitigating factors as well as the legislative purposes and principles related to sentencing. Tenn. Code Ann. § 40-35-302(d).

The trial court retains the authority to place the defendant on probation either immediately or after a term of periodic or continuous confinement. Tenn. Code Ann. § 40-35-302(e). The statutory scheme is designed to provide the trial court with continuing jurisdiction in the misdemeanor case and a great measure of flexibility. The misdemeanant, unlike the felon, is not entitled to the presumption of a minimum sentence. State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994). If the trial court's findings of fact are adequately supported by the record, this court may not modify the sentence even if it would have preferred a different result. State v. Fletcher, 805 S.W.2d 785 (Tenn. Crim. App. 1991).

In this case, the trial court ordered that the defendant serve his eleven month and twenty-nine day sentence in confinement, being eligible for work release or other such programs after service of thirty percent. When ordering the period of confinement, the trial court determined that the defendant was on probation at the time of the offense and cited the defendant's criminal history and his previous history of unwillingness to comply with a sentence involving release into the community as factors warranting a period of confinement. The record confirms that the defendant has previous convictions for driving under the influence, vandalism, and driving on a revoked license. In fact, he was on probation at the time this offense was committed. Under these circumstances, it is our view that the trial court did not err by imposing a sentence of confinement.

Accordingly, the judgment of the trial court is affirmed.

GARY R. WADE, PRESIDING JUDGE